No. 96-1581

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,
Petitioner,
v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

49 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI* CITIES	1
A. Early History	2
B. City History	3
C. Demographics and the Surrounding Area	7
D. Conflicts and Confusion	8
SUMMARY OF ARGUMENT	12
ARGUMENT	13
I. THE AGREEMENT IN THE *YANKTON* CASE NOW BEFORE THIS COURT IS THE "FUNCTIONAL TWIN" OF THE AGREEMENT AT ISSUE IN *DeCOTEAU v. DISTRICT COUNTY COURT*, AND THEREFORE THIS COURT SHOULD REVERSE ON THE BASIS OF *DeCOTEAU*	13
II. FACTORS DEMONSTRATING THE YANKTON AND SISSETON AGREEMENTS ARE FUNCTIONAL TWINS	15
III. ADDITIONAL PROVISIONS IN THE YANKTON AGREEMENT AND FACTORS IN THE SUBSEQUENT HISTORY OF THE YANKTON SIOUX TRIBAL GOVERNMENT MAKE THE YANKTON ARGUMENT FOR DISESTABLISHMENT EVEN STRONGER	20
IV. HISTORICAL DOCUMENTATION CONFIRMS THAT THE NEGOTIATORS AND THE YANKTON INDIANS EQUATED THE SISSETON-WAHPETON AGREEMENT WITH THE YANKTON AGREEMENT	23
V. SECONDARY SOURCES SHOULD ALWAYS BE CAREFULLY SCRUTINIZED	24

TABLE OF CONTENTS—Continued

	Page
VI. THE NEW POST-*HAGEN* POSITION OF THE UNITED STATES PROMISES NIGHTMARISH CONSEQUENCES AND IS COMPLETELY UNTENABLE	25
VII. THE ARTICLE XVIII ARGUMENT MAKES AN ENORMOUS ASSUMPTION AND LACKS SUBSTANTIVE SUPPORT IN THE YANKTON DOCUMENTS	27
VIII. THIS COURT SHOULD ACCORD THE LANGUAGE IN THE 1894 ACT ITS ORDINARY MEANING	29
CONCLUSION	30
APPENDIX	
Letter of Instruction from the Commissioner of Indian Affairs to the Sisseton Commission of August 13, 1889 (APPENDIX A)	1a
Excerpts from H.R. Rep. No. 7613, 59th Cong., 2d Sess. (1907) (APPENDIX B)	4a
Proclamation of April 11, 1892 opening the Sisseton-Wahpeton Reservation, 27 Stat. 1017 (APPENDIX C)	7a

TABLE OF AUTHORITIES

CASES:	Page
Andrus v. Glover Construction Co., 446 U.S. 608 (1980)	30
Bates v. Clark, 95 U.S. 204 (1877)	28
Burlington Northern R.R. v. Red Wolf, 106 F.3d 868 (8th Cir. 1997)	11
Colautti v. Franklin, 439 U.S. 379 (1979)	30
DeCoteau v. District County Court, 420 U.S. 425 (1975)	*passim*
Hagen v. Utah, 510 U.S. 399 (1994)	*passim*
Mattz v. Arnett, 412 U.S. 481 (1973)	26
Montclair v. Ramsdell, 107 U.S. 147	30
Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985)	30
Oregon Fish and Wildlife Dept. v. Klamath Tribe, 473 U.S. 753 (1985)	12, 14, 29
Perrin v. United States, 232 U.S. 478 (1914)	20
Primeaux v. Lee, Memorandum Opinion and Order, Civ. 94-9022 (D.S.D. 1995), *aff'd per curiam*, *Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. 1996)	4
Rice v. Rehner, 463 U.S. 713 (1983)	30
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	*passim*
Seymour v. Superintendent, 368 U.S. 351 (1952)	26
Solem v. Bartlett, 465 U.S. 463 (1984)	13, 26
South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986)	29
Spalding v. Chandler, 160 U.S. 394 (1896)	28
State v. Greger, 559 N.W.2d 854 (S.D. 1997)	13
State v. Williamson, 211 N.W.2d 182 (S.D. 1973)	5
State v. Winckler, 260 N.W.2d 356 (S.D. 1977)	4
United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876)	21
United States v. Menasche, 348 U.S. 528 (1955)	30
Ute Indian Tribe v. Utah, 935 F.Supp. 1473 (D. Utah 1996)	26
Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997)	26
Washington v. Washington Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979)	30

TABLE OF AUTHORITIES—Continued

	Page
Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980)	5
Wood v. Jameson, 130 N.W.2d 95 (1964)	5
Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F.Supp. 878 (D.S.D. 1995)	12
Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 99 F.3d 1439 (8th Cir. 1996)	2, 22
STATUTES:	
Treaty of April 19, 1858, 11 Stat. 743	27, 28
Act of March 3, 1891, 26 Stat. 1036	17
Act of April 11, 1892, 27 Stat. 1017	18
Act of August 15, 1894, ch. 290, 28 Stat. 286	15, 20, 27
Act of May 16, 1895, 29 Stat. 865	18
18 U.S.C. § 1151(a)	4
18 U.S.C. § 1151(b)	4, 5
CONGRESSIONAL MATERIALS:	
26 Cong. Rec. 6425 (1894)	18
Jurisdiction on Indian Reservations—Part 2: Hearing Before the Senate Select Committee on Indian Affairs, 96th Cong., 2d Sess. (Aug. 11, 1980)	9
Jurisdiction—Part 3, Investigations and Prosecution of Federal Crimes on Indian Reservations: Oversight Hearings Before the Committee on Interior and Insular Affairs, 100th Cong., 2d Sess. (1988)	10
Investigation and Prosecution of Federal Crimes on Indian Reservations: Hearings Before the Committee on Interior and Insular Affairs, House of Representatives, 101st Cong., 1st Sess. (1989)	10
H.R. Rep. No. 101-60, 101st Cong., 1st Sess. (1989)	10
Hearing before the Committee on Indian Affairs, S. Hrg. 104-694, 104th Cong., 2d Sess. (1994)	11

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES:	Page
Sup. Ct. R. 37(4)	2
Brief for the United States as *Amicus Curiae*, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182)	25
Brief for Respondent, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	7
Brief for the United States as *Amicus Curiae*, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	25
Memorandum for the United States as *Amicus Curiae*, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148)	25
Memorandum for the United States as *Amicus Curiae*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562)	25
Motion for Leave to File Brief and Brief *Amici Curiae* of the National Congress of American Indians, et al., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562)	25
Transcript of Oral Argument, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878 (D.S.D. 1995) (94-CV-4217)	9, 11
Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647)	26
Brief of Respondent, Southern Missouri Waste Management District in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (April 28, 1997)	14, 15
Brief of Respondent, Southern Missouri Waste Management District in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (August 7, 1997)	24
Brief of Charles Mix County, South Dakota, *Amicus Curiae* in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (August 7, 1997)	19

TABLE OF AUTHORITIES—Continued

	Page
Brief for Duchesne County, Utah and Uintah County, Utah, *Amici Curiae* in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, No. 96-1581 (August 7, 1997)	26
E. Peterson and L. Peterson, *1906 Atlas of Charles Mix County, South Dakota* (1906)	2, 3
A. Gnirk, *Epic of the Realm of Ree* (1984)	3, 6, 8
A. Gnirk, *Epic of the Great Exodus* (1985)	8
A. Gnirk, *Epic of Papineau's Domain* (1986)	3, 5, 6
1990 United States Census	4, 5, 6, 7
F. Prucha, *The Challenge of Indian History*, Journal of the West, Jan. 1995	13
Conference of Western Attorneys General, *American Indian Law Deskbook* (1993)	24
Constitution of the Yankton Sioux Tribe (1962)	22
Opinions of the Solicitor, Dep't of the Interior, M-27671 (March 1, 1934)	29

The cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, respectfully submit this brief as *amici curiae*, in support of Petitioner pursuant to Supreme Court Rule 37(4).

INTEREST OF *AMICI* CITIES

> The majority's assertion that 'Article XVIII of the 1894 statute indicated that as much of [the 1858] treaty as possible was to be preserved,' Maj. Op. at 1448, is based neither on the text—which referred only to annuities—nor the legislative history of the 1894 Act, and has at its source only, as best as I can discern, *a single-minded desire to avoid diminishment at all costs.*
>
> *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439, 1462 (8th Cir. 1996) (J. Magill dissenting). Pet. App. at 56 (emphasis added).

Five of the *amici* cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown are located within the 1858 boundaries of the reservation recently declared to exist by the court of appeals for the Eighth Circuit; two of the *amici* towns, Geddes and Platte, lie close to the purported boundaries. Each of the cities within the newly recognized boundaries of the Yankton Sioux Reservation has operated, since its founding a few years after the 1894 Surplus Land Act in question, as if no reservation boundaries exist. Each of the cities respectfully expresses its profound shock to this Court over the decision of the court of appeals. Importantly, we understand that this is only the second time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the first and only other case with a similar holding was promptly reversed in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). We respectfully request this Court to reverse the decision of the court of appeals, a decision which conflicts with both the prior and subsequent decisions of the South Dakota Supreme Court, and resolve the conflict and confusion created by the federal decision.

A. Early History.

Prior to the organization of Charles Mix County, South Dakota, this area was visited and occupied by various Indian tribes. E. Peterson and L. Peterson, *1906 Atlas of Charles Mix County, South Dakota,* 48 (1906). The Ree or Aricara Indians are among the earliest residents, dating back more than three hundred years. *Id.* at 48. The Ree were eventually driven out by the Oglala Sioux branch of the Tetons, who, in turn, were partially displaced by the Yankton Sioux in the early 1800's. *Id.* at 48. "Few of the Indians, however, had made this part of the state their principal place of abode as other localities seemed to them more desirable. This part of the state was therefore used only as a hunting ground." *Id.* at 48. By the mid-1800's, the Charles Mix County area was rarely hunted by the Indians, "for large game had sought better pastures farther west and north, and the Indians had gone with the game." *Id.* at 50. The Yankton Sioux eventually settled the area pursuant to the treaty of 1858. *Id.* at 48.

In the late 18th century and throughout the entire 19th century a continual non-Indian presence was felt in the area in the form of resident French trappers, explorers, river traders, wood cutters and the U.S. Army, whose influence culminated in 1857 with the completion of Ft. Randall. *Id.* at 48.

> In speaking of the history of Charles Mix county we shall see that it is in no sense a "new" county. It had a community life along the river before Dakota Territory was organized and had been visited by more white men before that time than any of the "old" counties not having a Missouri river front.

Id. at 48.

The 1858 treaty with the Yankton Sioux established the Yankton Sioux Reservation which consisted of approximately 430,000 acres in the eastern portion of what is now Charles Mix County. The Yankton Sioux settled the reservation on July 10, 1859, a date commonly associated with the restoration of all of Charles Mix County, except the Yankton reserve, to the public domain. *Id.* at 49. Charles Mix County was created at the first territorial legislature of Dakota by its act of May 8, 1862. *Id.* at 49. The Yankton Indian reservation was later incorporated into the county boundaries in 1873, although the reservation continued to have "little or nothing to do with county affairs and took no part in our community life until after the treaty of 189[4]." *Id.* at 48.

In 1892, the government negotiated with the Yanktons for the sale of their surplus lands, resulting in a treaty signed by a majority of the Tribe and ratified by Congress on August 15, 1894. *Id.* at 49. These lands were opened to homesteading by the president's proclamation of May 16, 1895 and were quickly populated. *Id.* at 49. By early 1900, virtually all of the surplus lands had been homesteaded. A. Gnirk, *Epic of the Realm of Ree,* 8 (1984). The population of Charles Mix County by 1900 was 8,498. 1906 *Atlas of Charles Mix County, South Dakota, supra,* at 46.

B. City History.

Several of the cities which are *amici* here were created along the Milwaukee Railroad through the "former Indian lands from Napa to Platte," South Dakota. A. Gnirk, *Epic of Papineau's Domain,* 143 (1986). In fact, the area of Charles Mix County which contains a majority of the country's towns was once part of the "Yankton Sioux Reservation until 1895 when the land of eastern Charles Mix County was thrown open to homesteaders." *Id.* at 143.

1. City of Wagner, South Dakota.

Wagner was created by the Milwaukee land company in 1900, just six years after the 1894 Act which opened the Yankton Reservation. *Epic of the Realm of Ree, supra,* at 62. According to the 1990 Census, Wagner's population was 1462, of whom 281 are Indian.

1990 Census of Population and Housing, Summary Population and Housing Characteristics, South Dakota, at 33, 57. City and county records indicate that there are approximately 1510 properties within the city limits of Wagner; approximately 1450 are owned by non-Indian persons or entities, four are owned by the Yankton Sioux Tribe, six are held in trust by the United States for an Indian person, and fifty are owned in fee by individual Indians.

The decision of the court of appeals would convert the entirety of Wagner to "Indian country" pursuant to 18 U.S.C. § 1151(a) by designating it as a reservation. Paradoxically, even as this case was being litigated, an Indian person failed in a claim that a housing development in Wagner qualified as "Indian country" presumably as a dependent Indian community under 18 U.S.C. § 1151(b). *See Primeaux v. Lee,* Memorandum Opinion and Order, Civ. 94-9022 (D.S.D. 1995), *aff'd per curiam, Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. 1996). The Defendant in that case failed *even to make the claim* that the entirety of Wagner should be declared Indian country as a "reservation;" the failure of the district court and court of appeals to find the housing area to be Indian country simply reaffirmed the long-held understanding of all the residents of the area that Wagner was not "Indian country" as a reservation pursuant to 18 U.S.C. § 1151(a) or partly "Indian country" pursuant to 18 U.S.C. § 1151(b).

The residents of Wagner can also point to *State v. Winckler,* 260 N.W.2d 356 (S.D. 1977), another case which arose within Wagner and in which the South Dakota Supreme Court stated that it had "ruled that the Yankton Indian reservation was disestablished. . . ." *Winckler,* 260 N.W.2d at 360.

In addition, as recently as 1980, a unanimous court of appeals was of the same opinion:

> In our opinion, the district court correctly determined that the crimes of grand larceny and burglary did not occur in "Indian Country" as defined in 18 U.S.C. § 1151(b), so as to preclude state court jurisdiction.[2] [2] The Supreme Court of South Dakota has twice determined that the original Yankton Indian Reservation had been diminished by an Act of Congress. *Wood v. Jameson,* 81 S.D. 12, 130 N.W.2d 95, 99 (1964); *State v. Williamson,* 211 N.W.2d 182, 184 (S.D. 1973). Appellant does not challenge these holdings in this appeal.

Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980).

2. *City of Lake Andes, South Dakota.*

Lake Andes was established as a railroad siding stop in 1900 and became a full-fledged town in 1904. *Epic of Papineau's Domain, supra,* at 143. Lake Andes was named the Charles Mix County seat in 1916 and remains the county seat to date. *Id.* at 143. Lake Andes submits the unlikelihood of the residents of Charles Mix County selecting a town within a "reservation" to be a county seat, when only half the county is within the purported boundaries. In any event, according to the 1990 Census, the population of Lake Andes was 846 persons, of whom 246 were Indians. *1990 United States Census, supra,* at 33. City and county records indicate that there are approximately 1060 properties within the city limits of which approximately 998 are owned by non-Indians or non-Indian entities, two of which are owned by the Tribe, eight are held in trust by the United States for an individual Indian, two are owned by the Native American Women's Resource Center and fifty are owned in fee by individual Indian persons.

Most of the county offices or headquarters are located in Lake Andes, as are various state offices. The Charles Mix County Law Enforcement Center is located in Lake Andes and provides services to the entire county and surrounding area. The city provides drinking water to all the Yankton Sioux tribal housing units within Lake Andes

and to the approximately 70 housing units in the Yankton Sioux Tribe housing units southeast of Lake Andes. The city itself maintains twenty-four separate housing units, through its city housing authority; many or most of these units are occupied by Indian persons. Like Wagner, Lake Andes can point to specific judicial authority which assured it, had there been any doubt, that the reservation had long been disestablished. In *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964), the South Dakota Supreme Court held that it was the purpose of the 1892 agreement and 1894 Act of Congress "to disestablish the reservation. . . ." *Id.* at 99.

3. *Town of Ravinia, South Dakota.*

The town of Ravinia was also created as a railroad stop in 1909. *Epic of the Realm of Ree, supra,* at 157. The 1990 Census sets the population of Ravinia at 79, 34 of whom are Indian. Of the 185 properties within its boundaries, approximately 182 are held by non-Indians and non-Indian entities and three are held in trust by the United States for an Indian person.

4. *Town of Dante, South Dakota.*

Dante was likewise founded as a railroad stop. According to the 1990 Census, its population is 98, of whom 12 are Indian. City and county records indicate that approximately 185 properties exist within its boundaries; no properties are owned by the Tribe, individual Indians, or by the United States in trust.

5. *Town of Pickstown, South Dakota.*

Pickstown, like each of the towns identified above, now finds itself within the purported boundaries of the Yankton Sioux reservation. Pickstown was created in 1947 by the United States Army Corps of Engineers to accommodate construction workers and their families while working on the Fort Randall Dam. *Epic of Papineau's Domain, supra,* at 527. Pickstown was released from its

federal domination in 1986 and the properties were sold, ceded or relinquished to its residents. According to the 1990 Census, its population was 95, of whom 6 were Indian. The official records of the city indicate there are approximately 190 properties within the city limits; 186 are owned by non-Indians or non-Indian entities and four are owned by Indians. There are no properties owned by the Yankton Sioux Tribe or held in trust by the United States government.

C. Demographics and the Surrounding Area.

Generally speaking, the demography of the situation in the entire area parallels the area under consideration in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Keeping in mind that in this litigation the contested area, as in *DeCoteau*, involves essentially the non-Indian fee lands, only one other point need be specially noted. In *DeCoteau*, approximately 90% of the tribal members were said to actually reside on trust lands (in HUD community housing projects and other individual homes). Brief for Respondent at 196, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148). In this 1858 Yankton reservation area, that percentage is apparently somewhat less, though a clear majority of the Yankton tribal members are similarly situated. And while the trust allotments of the members do constitute approximately 10% of the total land base, only a small fraction of that area is actually resided upon or farmed by members of the Yankton Sioux Tribe. Again, this fact situation parallels that presented in *DeCoteau*. *Id.*

The five cities above, all of which find themselves within the 1858 boundaries of the Yankton reservation, are joined in this *amici* brief by two sister cities, Geddes and Platte. Geddes is located approximately fifteen miles northwest of Lake Andes, or one mile west of the eastern 1858 boundary. Platte was established in 1900 as the last city on the railroad line running west in Charles Mix

County. A. Gnirk, *Epic of the Great Exodus*, 92 (1985). Both cities are demographically similar to those noted above.[1]

D. Conflicts and Confusion.

Each of the *amici* cities within the 1858 boundaries has experienced immediate dramatic adverse impacts as a result of the decisions of the district court and court of appeals, despite the subsequent decision of the South Dakota Supreme Court. Problems involving law enforcement, zoning, landlord-tenant, provision of utilities, and foreclosures, all difficult in the best of situations, have become permeated with uncertainty. Local officials cannot reliably and finally say that state, or federal law actually applies to a diverse variety of situations which occur on the non-Indian lands within the 1858 boundaries and within their cities. The uncertainty provides an additional means by which those who wish to evade the law can do so and provides a similar haven to those who commit civil wrongs against their neighbors.

The jurisdictional uncertainty referred to above has been exacerbated by the failure of the federal authorities

[1] Although not included as *amici*, two additional towns in Charles Mix County which were not created or established due to the railroad were Marty and Greenwood. Marty was founded in 1913 and is located 10 miles south of Ravinia and 13 miles southwest of Wagner and was named for the Rt. Rev. Martin Marty, a pioneer Catholic bishop in South Dakota. *Epic of the Realm of Ree*, *supra*, at 12,186. The town of Marty is, perhaps, best known for the mission and Indian school located there. *Id.* at 196. According to official county records, all of the land within the boundaries of Marty is held in trust by the United States government for the benefit of an Indian person or is owned by an individual Indian person. According to the 1990 census, the population of Marty was 436 persons, 412 of which were Indian persons.

The town of Greenwood is located approximately 5 miles southeast of Marty and was first established as an Indian agency. All of the property located within the boundaries of Greenwood is held in trust by the United States government for individual Indian persons.

to provide adequate resources to meet the responsibilities they now claim as a result of the federal decision. Prior to the decision of the courts below, all law enforcement activities on non-Indian lands were provided locally through a centrally located county law enforcement center; a full-time sheriff, with three full-time deputies and two part-time deputies; and supplemented by local police departments with six full-time officers and two part-time officers. The State circuit court is located in the Charles Mix County courthouse in Lake Andes, South Dakota.

After the decisions, the United States claims that it has jurisdiction of felony investigations involving Native American suspects or Native American victims, but it has provided only one FBI agent based over one hundred miles outside the county in Sioux Falls, South Dakota. The federal court is also located there. Further, the FBI agent's duties are not limited to investigations within the 1858 boundaries; rather, the additional investigations were simply added to the agent's already heavy urban case load. The United States Attorney's Office has not provided additional staff to handle the cases it now claims.[2] Further, despite its new assertion of jurisdiction, the federal authorities have no plans at present to base any FBI locally, to the cities' knowledge. The result is clearly a decline in effective law enforcement.[3] The crimi-

[2] The tribal chairman indicated at trial that he intended that the United States would greatly expand its criminal law jurisdiction if the Tribe were successful in this litigation. Tr. at 330-331. *Yankton Sioux v. Southern Missouri*, 890 F.Supp. 878 (D.S.D. 1995) (94-CV-4217). He admitted, however, that he had not discussed the increased jurisdiction with the U.S. Attorney nor did he know the position of the U.S. Attorney on the matter. *Id.* at 331. (The cities suggest that the United States was just as shocked by the decisions below finding the 1858 boundaries intact as were the *amici* cities.)

[3] The present situation is not surprising, for even when reservation status is not apparently at issue, reservation law enforcement is generally regarded as ineffective, especially with regard to the "most common crimes." *See, e.g., Jurisdiction on Indian Reserva-*

nal law problem, however, presents more than the difficulties attendant to a decline in effective law enforcement. The most critical problem is that, without intervention by this Court, there is no solution to the controversy over which entity actually has jurisdiction of the crimes now being committed. Numerous habeas corpus petitions are already ongoing and will continue to challenge the jurisdiction of courts which have in the past or might in the future take jurisdiction of a now disputed criminal case. Uncertainty thus permeates the criminal law, as well as the civil law sphere, within the *amici* cities.

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tions—Part 2: Hearing Before the Senate Select Committee on Indian Affairs, 96th Cong., 2d Sess. at 24 (Aug. 11, 1980) (hereinafter *Jurisdiction—Part 2*): "The most common crimes, such as assaults or small burglaries, simply are not prosecuted in the vast majority of instances." (comment of Caleb Shields, Ft. Peck Tribal Executive Board); *Id.* at 56 (comment of Senator Melcher revealing complaints of state judges that federal authorities do not prosecute even major crimes); *Id.* at 32 (comment of local chief of police that only one of ten "felony-type" theft, burglary or assault cases are prosecuted on the reservation); *Id.* at 26 (United States Magistrate's comment on infrequency of prosecution of reservation assaults). Similar testimony was received approximately a decade later. *See, e.g., Investigation and Prosecution of Federal Crimes on Indian Reservations: Hearings Before the Committee on Interior and Insular Affairs*, House of Representatives, 101st Cong., 1st Sess. at 187 (1983): "[O]nly the most aggregious [sic] and clear-cut cases can properly be pursued." (comment of Tribal Chairman Ketachezan); *Id.* at 281: "[W]e see an awful lot of people who probably should be prosecuted for different things just simply slip through because no one is quite sure who is in charge." (comment of Representative Campbell); *See also* H.R. Rep. No. 101-60, 101st Cong., 1st Sess. at 7 (1989). In addition, legislators in both the 1980 and 1989 hearings drew attention to the fact that reservation law enforcement let cases "fall through the cracks." *See Jurisdiction—Part 2, supra*, at 21 (comment of Senator Melcher); *Investigations and Prosecution of Federal Crimes on Indian Reservations: Oversight Hearings Before the Committee on Interior and Insular Affairs*, 100th Cong., 2d Sess. 249 (1988); *Prosecution of Federal Crimes, supra*, at 249: "Case-by-case determination can lead to a cumbersome, inefficient process which ultimately leads to cases falling through the cracks." (comment of Representative Tim Johnson.)

We note further, that, at trial, the tribal chairman was equivocal as to whether the Tribe *intended* to exercise jurisdiction over non-Indians on non-Indian lands, assuming that it was successful in the litigation. *See, e.g.*, Tr. at 322-334, *Yankton Sioux v. Southern Missouri*, 890 F.Supp. 878 (D.S.D. 1995) (94-CV-4217). Nonetheless, since the Tribe has been successful in the federal litigation, it has made it very clear to local city officials, in conferences and otherwise, that the Tribe *will* attempt to regulate non-Indian hunting and fishing on non-Indian lands, *will* establish licensing procedures with regard to non-Indians, and *will* attempt to regulate access to state and federal facilities and lands by non-Indians, particularly those on the Missouri River. The Tribe has not exercised such jurisdiction at least since *amici* towns were founded in the early 1900's, and the Tribe thus promises to radically alter the status quo.

The residents of Charles Mix County are, by and large, highly informed as to cases being litigated in other parts of the nation regarding tribal issues. Aberrant tribal court outcomes such as that appealed in *Burlington Northern R.R. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997) are tremendously unsettling to the non-Indian residents. Further, the inevitability of extensive and burdensome litigation over tribal regulation and control of non-Indian interests, as detailed above, has caused land owners to suspect that a further and significant decrease in property values is likely in the event the court of appeals decision is not reversed.[4]

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[4] One recent witness at a Senate Indian Affairs Committee hearing, a rancher on South Dakota's Cheyenne River Sioux Reservation, testified that it was his opinion that the prices of property on that reservation "are regularly discounted about 25 percent. These facts make it difficult for non-Indians to either stay or leave." Tribal Sovereign Immunity: Hearing before the Committee on Indian Affairs, S. Hrg. 104-694, 104th Cong., 2d Sess. at 45. The recent experience of *amici* towns has led them to surmise that the loss in property value identified in the Senate Hearing will most

SUMMARY OF ARGUMENT

The court of appeals failed to apply the precedent of *DeCoteau* in this case. A cursory review of the *DeCoteau* decision and the 1891 Sisseton-Wahpeton agreement demonstrates that the 1891 agreement is, in fact, the functional twin of the 1894 Yankton agreement. The provisions and formats in both agreements are virtually identical. In addition, the congressional representatives and other participants in the process specifically made the comparisons and relied upon the earlier Sisseton-Wahpeton agreement as precedent. The demographics and the subsequent jurisdictional histories of the two areas are also remarkably similar. In two respects, the Yankton documentation presents even stronger factors for disestablishment.

This Court's precedent in *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584 (1977) indicates that this type of analysis should have at least been considered by the court of appeals. *See also Oregon Fish and Wildlife Dept. v. Klamath Tribe*, 473 U.S. 753 (1985). It was not. The decision of the court of appeals should be reversed by this Court.

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probably be replicated within the 1858 boundaries, should the decision of the court of appeals remain unreversed.

ARGUMENT

> FATHER PRUCHA: "THE GAP IS WIDENING, I FEAR, BETWEEN SOLID HISTORICAL ACCOUNTS AND THE PSEUDO-HISTORICAL OR MYTHICAL ACCOUNTS ADOPTED AND PROCLAIMED BY MANY INDIANS AND THEIR WHITE ADVOCATES."
>
> Francis Paul Prucha, *The Challenge of Indian History*, Journal of the West, Jan. 1995, at 3.

I.

THE AGREEMENT IN THE *YANKTON* CASE NOW BEFORE THIS COURT IS THE "FUNCTIONAL TWIN" OF THE AGREEMENT AT ISSUE IN *DECOTEAU v. DISTRICT COUNTY COURT*, AND THEREFORE THIS COURT SHOULD REVERSE ON THE BASIS OF *DECOTEAU*.

> Construing Article XVIII in the sweeping manner defendant advocates ignores the remainder of the Act. Such a result would be an *extravagant misuse of the canons of statutory construction* to salve modern sensibilities, especially given that the language in Articles I and II is so "precisely suited" to diminishment. Courts should not presume Congress intended an "absurd result." . . . To give Article XVIII pointed emphasis allows it to negate the preceding seventeen articles, and that is a result contrary to the plain meaning of the rest of the Agreement.
>
> *State v. Greger*, 559 N.W.2d 854, 865 (S.D. 1997) (citation omitted) (emphasis added).

Not only did the court of appeals spurn the bright-line "presumption" articulated in *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v. Utah*, 510 U.S. 399 (1994), the court also failed to apply the precedent of *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In *DeCoteau*, this Court considered an agreement of the United States with the Sisseton-Wahpeton Sioux Tribe

which resulted in disestablishment. The Yankton Agreement of three years later is the "functional twin" of the Sisseton Agreement and *DeCoteau* therefore strongly suggests a finding of disestablishment in the *Yankton* case.

The term "functional twin" was employed by the Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 609 (1977), and denoted the identity, except for the "operative language" of the Agreements, of a 1907 Agreement and an earlier 1904 Agreement. Because the Agreements constituted "functional twins," except for the critical "operative" language, the Court found the later Agreement (which *lacked* cession language) accomplished disestablishment, just as the earlier agreement had accomplished disestablishment. *Id.* As we demonstrate below, the origin, content, and outcome of the Sisseton and Yankton agreements make them even better "functional twins" than the agreements at issue in *Rosebud*. *See also Oregon*, 473 U.S. 753.

This argument takes on special importance for the residents of the *amici* cities because of the proximity of the former Sisseton reservation at issue in *DeCoteau* (roughly 150 miles northeast of the *amici* cities) and because the agreements and local histories of the two areas were known to be so similar. *Amici* cities and their residents could and legitimately did, we respectfully submit, continue to assume that no reservation existed at Yankton based on *DeCoteau* and the legal and factual similarities between the two situations.

Summarily, in every respect even arguably significant, the Yankton documents mirror and reflect the same terminology, discussions, considerations, policies, and generalities presented in *DeCoteau*. The Yankton Commissioners even repeatedly referred specifically to the terms of the Sisseton Agreement. Br. of Resp't District in Supp. of Pet'r at 18-19. *See also*, South Dakota Representative Pickler's remarks in the congressional record ("same kind of a treaty we have always made" . . . "procure these

lands in the same way" . . . "we make no departure from our past policy" . . . "just as all other cessions of land" . . .). *Id.* at 36-37. As a result, in both instances the Commissioner of Indian Affairs and the Secretary of the Interior also acknowledged that both reservations were "restored to the public domain." *Id.* at 9. *See generally Hagen*, 510 U.S. at 412-414 (public domain).

In this light, we submit that the "functional twin" characteristics of the two situations do, in fact, demonstrate that this Court's decision in *DeCoteau* should dispose of this case.

II.

FACTORS DEMONSTRATING THE YANKTON AND SISSETON AGREEMENTS ARE FUNCTIONAL TWINS.

SISSETON DISESTABLISHMENT	YANKTON DISESTABLISHMENT
Time period equivalent	***Time period equivalent***
Agreement approved 1891. *DeCoteau*, 420 U.S. at 427.	Agreement approved 1894. 28 Stat. 286 (1894).
Allotment of substantial territory under General Allotment Act.	***Allotment of substantial territory under General Allotment Act.***
DeCoteau, 420 U.S. at 455.	Exhibit 605, at 5.
Interior Instructions to Commissioners	*Interior Instructions to Commissioners*
"The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof."	"The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof."
"The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying form of agreement, which should be signed by at least a majority of the male adults of the bands." Cities App. at 2a.	"The terms and conditions agreed upon in council should be reduced to writing and incorporated in the accompanying form of agreement which should be signed by at least a majority of the male adults of the members of the tribe." Br. Resp. in Support of Pet. at 50a.

Preambles equivalent.	*Preambles equivalent.*
The Sisseton Indians "are desirous of disposing of a portion of the land set aside and reserved to them. . . ." *DeCoteau*, 420 U.S. at 455.	"The Yankton Tribe . . . is willing to dispose of a portion of land set aside and reserved to said Tribe. . . ." Pet. App. at 112.
Cession language used.	*Cession language used.*
"The Sisseton and Wahpeton Bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest. . . ." Art. 1, cited at *DeCoteau*, 420 U.S. 456.	"The Yankton Tribe of Dakota or Sioux Indians hereby cede sell, relinquish, and convey to the United States all their claim, right, title, and interest. . . ." Art. I, Pet. App. at 112-113.
All unallotted lands ceded.	*All unallotted lands ceded.*
Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement. . . ." Art. 1, *DeCoteau*, 420 U.S. at 456.	Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid." Art. I, Pet. App. at 112-113.
Sum Certain Language Used.	*Sum Certain Language Used.*
Sesseton Agreement provides "[i]n consideration for the lands ceded, sold, relinquished and conveyed . . . the United States stipulates and agrees to pay . . . the sum of two dollars and fifty cents per acre for each and every acre thereof. . . ." Art. 2, *DeCoteau*, 420 U.S. at 456.	Yankton agreement provides "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the United States . . . the United States stipulates and agrees to pay . . . the sum of six hundred thousand dollars. . . ." Art. II, Pet. App. at 113.
Entry subject to homestead and townsite laws.	*Entry subject to homestead and townsite laws.*
"That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall . . . be subject only to entry and settlement under the homestead and town-site laws of the United States. . ." Act of Mar. 3, 1891, 26 Stat. 1036.	"That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States. . ." Pet. App. at 123.
Missionaries allowed to purchase lands.	*Missionaries allowed to purchase lands.*
Art. 2, *DeCoteau*, 420 U.S. at 457.	Art. X, Pet. App. at 117.
School lands granted to State with public domain premise.	*School lands granted to State with public domain premise.*
("excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State"). *DeCoteau*, 420 U.S. at 442. For public domain premise, see Cities App. at 4a-6a.	("excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be common-school purposes and be subject to the laws of the State of South Dakota"). Pet. App. at 123. For public domain premise, see Cities App. at 4a-6a.
United States retained an agency and schools.	*United States retained an agency and schools.*
DeCoteau, 420 U.S. at 435 n.16; *id.* at 438 n.19.	Pet. App. at 116.
Lands retained were scattered about the former reservation.	*Lands retained were scattered about the former reservation.*
DeCoteau, 420 U.S. at 428.	Pet. App. at 159.
The proclamation opening the reservation referred to a conveyance of "all their title and interest" and quoted the cession language of the Act.	*The proclamation opening the reservation referred to a conveyance of "all their claim, title and interest" and repeated the cession language of the Act.*
"[A]greement made with said Indians residing on said reservation, dated December 12, 1889, they conveyed, as set forth in article one thereof, to the United States, all their title and interest in and to all the unallotted lands within the limits of the reservation set apart as aforesaid remaining after the allotments shall have been made . . . it is provided in the act of Congress approved March 3, 1891 (26	"[S]aid Yankton tribe of Sioux or Dacotah Indians for the consideration therein mentioned, ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said tribe. . . Whereas, it is provided in the act of Congress accepting, ratifying and confirming the said agreement approved

U.S. Statutes, pp. 1036-1038, Sec. 30), accepting and ratifying the agreement with said Indians: 'That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States' ". . . . Cities App. at 7a-8a.	August 15, 1894, section 12 (Pamphlet Statutes 53d Congress, 2d session, pages 314 to 319), 'That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States' ". . . . JA at 453.
The proclamation opening the reservation referred to a "schedule of lands within the . . . reservation . . . ."	*The proclamation opening the reservation referred to a "schedule of lands within the . . . reservation . . . ."*
27 Stat. 1017, 1018 (April 11, 1892).	29 Stat. 865, 866 (May 16, 1895).
Congress clearly intended to return the land to the public domain.	*Congress clearly intended to return the land to the public domain.*
DeCoteau, 420 U.S. at 440-441.	26 Cong. Rec. 6425 (1894); *id.* at 6426.
State assumed virtually unquestioned jurisdiction.	*State assumed virtually unquestioned jurisdiction.*
DeCoteau, 420 U.S. at 442.	Pet. App. at 38; Dissent, Pet. App. at 62; *Greger*, Pet. App. at 154-155.
Sisseton and Yankton generally treated in parallel fashion on maps.	*Sisseton and Yankton generally treated in parallel fashion on maps.*
Exhibit 33 (1889) (showing both reservations; Exhibit 620 (1901) (eliminates both Yankton and Sisseton reservations); Exhibit 621 (1910) (eliminates both reservations); Exhibit 44 (1909) (BIA both Sisseton and Yankton as blank).	Exhibit 33 (1889) (showing both reservations; Exhibit 620 (1901) (eliminates both Yankton and Sisseton reservations); Exhibit 621 (1910) (eliminates both reservations); Exhibit 44 (1909) (BIA both Sisseton and Yankton as blank).

As noted above, in *Rosebud*, the Court found a 1907 Act to diminish the Rosebud reservation the same as the 1904 Act even though the 1904 Act *had* contained language of cession and the 1907 Act had *not* contained language of cession. This Court found that "as the legislative comments make clear . . . the change in § 1 language was not intended to modify or change the purposes or operation of the 1904 Act." *Rosebud*, 430 U.S. at 609. *Rosebud* thus strongly indicated that when identical language is used, identical results are intended. This was so, in the case of *Rosebud*, even when the operative language was different and when the "cession language" was eliminated, because the legislative comments made clear that no change from the earlier Act was intended.

In this instance, as Charles Mix County has noted, even the United States has described the Sisseton Agreement as "a similar and contemporaneous cession agreement" containing "the same language." Brief of Charles Mix County, South Dakota, *Amicus Curiae* in Support of Petitioner, State of South Dakota at 25-26 (citing BUS, Co. Pet. App. at 166a).

There are a few differences between the agreements. *Both* agreements, however, contain the critical cession and sum certain language as "operative language." *See Hagen*, 510 U.S. at 412-416. Several of the changes from the Sisseton to the Yankton agreement, moreover, make the Yankton agreement even a stronger argument for disestablishment than the Sisseton agreement.

III.

ADDITIONAL PROVISIONS IN THE YANKTON AGREEMENT AND FACTORS IN THE SUBSEQUENT HISTORY OF THE YANKTON SIOUX TRIBAL GOVERNMENT MAKE THE YANKTON ARGUMENT FOR DISESTABLISHMENT EVEN STRONGER.

The liquor provision and its history are of special importance, for the Yankton Act contained this provision while the Sisseton Act did not. Article XVII of the 1894 Yankton Act provided that intoxicating liquor could not be sold upon reservation lands after they were ceded and opened to settlement:

> No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

Act of August 15, 1894, ch. 290, 28 Stat. 286, 318; Pet. App. at 120.

Thus, federal liquor laws applied on lands, "as described in the treaty between the said Indians and the United States, dated April 19th, 1858. . . ." *Id.* This provision would be surplusage if the reservation were *not* diminished by the Act of 1894, as intoxicants were *already* forbidden in "Indian country" by federal law. *Perrin v. United States*, 232 U.S. 478, 484 (1914). Furthermore, this Court has said, of a provision in the 1910 Act concerning the Rosebud Sioux Reservation, that:

> the most reasonable inference from the inclusion of this [liquor prohibition] provision is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country" because not in the Reservation.

Rosebud, 430 U.S. at 613. *See also id.* at n.47.

The legislative history of Article XVII in the Yankton Act also supports this proposition. According to the 1893 Commissioner of Indian Affairs Report to Congress on the Yankton Agreement:

> Article XVII, prohibiting the sale or disposition of intoxicants upon any of the lands now within the Yankton reservation, seems to be a desirable provision, and from the decision of the Supreme Court in *United States v. 43 Gallons of Whiskey* (93 U.S. 188), the stipulation would appear to be valid if ratified by the United States.

Exh. 605, Pet. App. at 15. The passage implies diminishment in that it referred in 1893 to lands "*now* within the Yankton Reservation. . . ." Thus, before the Yankton agreement was ratified by Congress in 1894, the Commissioner looked to a time when the lands would *not* be "within the Yankton Reservation."

Further significance is found in the citation of *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876). In that case, the Court held that Congress may prohibit liquor not only within "Indian country," but also within a "territory in proximity to that where the Indians live." *Id.* at 195. The citation of this case by the Commissioner of Indian Affairs indicates that he believed that the ceded lands would no longer be part of a reservation but that this Court's decision in *Forty-Three Gallons of Whiskey* would nonetheless permit the liquor prohibition of Article XVII.

A further salient distinction, demonstrating that a case for disestablishment of Yankton is even stronger than at Sisseton, is found in the tribal constitutions. In 1946, the tribal constitution at Sisseton claimed jurisdiction only as to:

> *Indian owned lands* lying within the territory within the original confines of the Sisseton-Wahpeton Lake Traverse Sioux Reservation.

DeCoteau, 420 U.S. at 443 (quoting Article 1 of the October 16, 1946, Constitution) (emphasis added). In 1966, three years after the court of appeals had found the 1891 Act terminated the Sisseton Reservation, the Commissioner of Indian Affairs approved a new constitution which provided that the jurisdiction of the Tribe shall "extend to lands lying in the territory within the original confines of the Lake Traverse Reservation. . . ." *Id.* (quoting the 1966 Constitution). Thus, by 1966, the Sisseton Tribe claimed reservation boundaries in its constitution.

The constitutions at Yankton, however, have *never* claimed such boundaries. According to the 1962 Constitution of the Yankton Sioux Tribe, a Constitution which remains in effect *to this day*:

> The territory under which this Constitution shall exist shall extend to all original tribal lands *now owned by the Tribe* under the treaty of 1858.

J.A. at 493 (emphasis added). The Yankton Constitution has never been amended to claim tribal boundaries.

Thus, in coming before this Court, the Yankton Sioux Tribe cannot assert a tribal constitutional claim to reservation boundaries. It would, moreover, be highly anomalous to allow a tribe to succeed on a claim of boundaries in this Court when it had not even made that claim in its own constitution. In this respect also, the Yankton situation presents a stronger and more persuasive case for disestablishment than did the Sisseton case.

The Tribe's attempt to distinguish the two agreements is derived mainly from the Section XVIII savings section. As the Dissent below pointed out, however, there is *nothing in the record which supports the contention that the savings section was meant to preserve the boundaries of the reservation. Yankton Sioux v. Southern Missouri*, 99

F.3d 1439 (8th Cir. 1996); Pet. App. at 54-56. Furthermore, the savings section is itself internally ambiguous in providing both for the preservation of *all* provisions of the 1858 agreement and the *annuity* provisions of the 1858 agreement. *Id.*

In *Rosebud*, the 1907 Agreement was the "functional twin" of a 1904 Agreement even though the 1907 Agreement lacked the "operative language" of "cession." Here, the Yankton agreement and the Sisseton agreement both contain the critical "cession and sum certain" language, and numerous other indicia that they should be treated equivalently. Furthermore, the Yankton agreement is in certain respects stronger than the Sisseton agreement with regard to disestablishment. Given this situation, the *Rosebud* "functional twin" analysis strongly suggests a finding that the Yankton reservation, like the Sisseton reservation, has been disestablished.

IV.

HISTORICAL DOCUMENTATION CONFIRMS THAT THE NEGOTIATORS AND THE YANKTON INDIANS EQUATED THE SISSETON-WAHPETON AGREEMENT WITH THE YANKTON AGREEMENT.

With this background, it is not surprising that the negotiators and Indians at Yankton both equated the Sisseton agreement signed in 1889 with the Yankton agreement signed in 1892. For example, Commissioner Cole said during the Yankton negotiations:

> The Commissioners are now ready to make you an offer for your surplus lands . . . . It is more than the Government paid for the Sisseton reservation and it is the highest price we have ever known the Government to offer.

Exhibit 605, at 80. Tribal member John Cole also said that "[t]he Sisseton Reservation was purchased by the government at $2.50 per acre." *Id.* at 77. Henry Selwyn

linked the 1892 Yankton agreement with both the Treaty of 1858 by which the Yankton reservation had been diminished *and* the transaction by which the Sisseton Indians had sold their lands. He stated:

> I will now refer to the treaty of 1858. This is the second time we sold land to the Government. I think they should be very grateful to us for selling our land. . . . If the Sissetons and Titowan had sold their land at the same prices at which we sold ours in 1858 per acre they would have given the Government their lands for nothing.

Id. at 63. The identity of the two agreements makes it logical that the Yankton Indians should perceive the Sisseton agreement as equivalent to theirs. It confirms that the two agreements are, in fact, "functional twins."

V.

SECONDARY SOURCES SHOULD ALWAYS BE CAREFULLY SCRUTINIZED.

The Cities are aware of the fact that Felix Cohen's Handbook of Federal Indian Law generally and directly supports the Yankton disestablishment argument, as do the subsequent revisions of that text. The Brief for Southern Missouri makes that point. Brief for Southern Missouri at 44. In this instance, this fact is all the more remarkable in light of another consideration. Namely, it has been generally observed that the original Cohen text (and the subsequent revisions) have been viewed by some as tribal advocacy works. *See* Conference of Western Attorneys General, American Indian Law Deskbook at xiii-xv (1993).

Nevertheless, in *DeCoteau, Rosebud,* and *Hagen,* the analysis of this Court was not based upon secondary sources of this nature. In fact, some of the authors, editors and contributing writers involved in the revised edition of the Handbook of Federal Indian Law have individually submitted arguments in categorical opposition to

diminishment/disestablishment positions. *See, e.g.,* Brief for the United States as Amicus Curiae, *Mattz v. Arnett,* 412 U.S. 481 (1973) (No. 71-1182); Brief for the United States as Amicus Curiae, and Memorandum for the United States as Amicus Curiae, *DeCoteau,* 420 U.S. 425 (1975) (No. 73-1148); and Memorandum for the United States as Amicus Curiae and Motion for Leave to File Brief, and Brief Amici Curiae of the National Congress of American Indians, et al., *Rosebud Sioux Tribe,* 430 U.S. 584 (1977) (No. 75-562), submitted in cases where such views have been rejected by this Court. In the final analysis, the support for the Yankton disestablishment argument in this type of text, only demonstrates the strength of the Yankton documents.

VI.

THE NEW POST-HAGEN POSITION OF THE UNITED STATES PROMISES NIGHTMARISH CONSEQUENCES AND IS COMPLETELY UNTENABLE.

As Charles Mix County has noted, another generic argument that the United States has endorsed and submitted in litigation of this kind promises even more unsettling consequences than the simple reversal of the position of the United States in regard to the 1894 Yankton cession statute. The new argument of the United States, submitted subsequent to *Hagen* in the Tenth Circuit and now in the Eighth Circuit Court of Appeals, summarily undermines the effect of all disestablishment precedent on reservation boundaries and would leave local jurisdictions in almost impossible situations.

According to this new post-*Hagen* argument, even if an act was intended to diminish or disestablish a reservation or a portion thereof, it would remove from Indian country status only those lands ceded, restored to the public domain, or otherwise directly affected, leaving reservation boundaries *intact* so as to encompass all other fee lands in the same area. As a result, even if we

prevail in this Court, and even though this argument flies in the face of the submissions in *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v. Utah*, 510 U.S. 399 (1994), persistence by the United States on this point could create the same chaos in South Dakota (and in all states previously affected by these and related decisions) as it has for the Counties of Duchesne and Uintah in the State of Utah. *See Ute Indian Tribe v. Utah*, 935 F. Supp. 1473 (D. Utah 1996) and *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), where this argument recently received favorable consideration, after *40 months* of needless post-*Hagen* litigation, which is not over yet, as Charles Mix County and the Utah amici Counties have noted.

This post-*Hagen* argument is based only on isolated sentences in the *Hagen opinion*, taken out of context and used in conjunction with "diminished" terminology to support a reservation concept that would have been unthinkable a century ago. Although this argument is pure sophistry, it is beyond the scope of the arguments in this brief to address it in detail and others have assumed that responsibility. See Brief for Duchesne County, Utah, and Uintah County, Utah, *Amicus Curiae*. For this reason, the cities have simply reproduced in its entirety note 6 at 17, of the Brief of the United States submitted in the instant case in the court of appeals, as Cities App. at 1a, *infra*. Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees at 17 n.6, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647). This note outlines the thrust of the new post-*Hagen* argument of the United States. The Court should make clear in its opinion that this novel post-Hagen argument was also considered and rejected in this case, consistent with the question presented and the established precedent of this Court.

VII.

THE ARTICLE XVIII ARGUMENT MAKES AN ENORMOUS ASSUMPTION AND LACKS SUBSTANTIVE SUPPORT IN THE YANKTON DOCUMENTS.

1858 TREATY PROVISIONS

ARTICLE I . . . [C]ede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows [metes and bounds description] . . . so as to include the said quantity of four hundred thousand acres.

ARTICLE IV. In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

> 1st. To protect the said Yanctons in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

Treaty of April 19, 1858, 11 Stat. 743, 744.

1894 SAVINGS CLAUSE

> ARTICLE XVIII. Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Act of August 15, 1894, 28 Stat. 286, 318; Pet. App. at 120.

The Tribe relies on this Article XVIII savings clause in the 1894 Act to support the argument that the metes and bounds boundaries of the 1858 "tract of four hundred thousand acres of land" should still be recognized.

In the first place, the United States and the Tribe *agreed* by the terms of the 1894 cession agreement to dispose of a substantial portion of this 1858 tract of land set apart for their "future home" or reservation. As a result, a change in the limits or boundaries of this tract to reflect this 1894 cession *agreement* would not abrogate the 1858 treaty. Instead, such a change, voluntarily and knowingly agreed to by both parties, was a modification of the 1858 treaty, supported by a consideration paid by the United States of $600,000. It was not an abrogation of the 1858 treaty. Of course, other unrelated 1858 treaty "provisions" did remain in full force and effect, like the annuity provisions.

Secondly, this savings clause argument erroneously assumes that one of the 1858 treaty benefits spelled out in the 1858 treaty was that the United States promised to maintain the 1858 boundaries intact, irrespective of a subsequent change in tribal ownership status within those boundaries (or at least such a result was intended by Congress to be included therein in 1858). Generally speaking, in 1858 (and for decades thereafter), this premise would have been *contrary* to all established principles of federal Indian law. At that time, extinguishment of Indian title also necessarily extinguished the Indian character of the land. *Bates v. Clark*, 95 U.S. 204 (1877). Moreover, as Solicitor Margold noted:

> The Yankton Sioux Indian Reservation was established by the treaty of April 19, 1858 (11 Stat. 744). *The right of the Indians to the reservation thereby created was that of use and occupancy, the United States having the title in fee. Spalding v. Chandler* (160 U.S. 394). By an agreement entered into December 31, 1892, and ratified by the act of August 15, 1894 (28 Stat. 286, 314), the Yankton Sioux Indians *ceded and sold to the United States for a consideration of $600,000 a part of the reservation. . .*

Opinions of the Solicitor, Dep't of the Interior, M-27671 (March 1, 1934) (emphasis added).

The above opinion was approved by the Secretary of the Department of the Interior in 1934.

This fact, together with the undisputed point that *nothing* in the 1858 treaty *or* the accompanying history can be cited to establish any Congressional intent to create an obligation on the part of the United States to maintain the 1858 boundaries, wholly undermines the credibility of this position.

In addition, this argument ignores the sum and substance of the 1894 Yankton documentation. In every respect this documentation is plainly inconsistent with such a position.

VIII.

THIS COURT SHOULD ACCORD THE LANGUAGE IN THE 1894 ACT ITS ORDINARY MEANING.

In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986), this Court had occasion to address a general issue of statutory construction in great detail in an Indian law case. At the end of the day, what the Court said there, bears repeating:

> The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress[16] . . . [16] See *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975), courts cannot ignore plain language

> that, viewed in historical context and given a 'fair appraisal,' *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. [658, 673 (1979)], clearly runs counter to a tribe's later claims"); *Rice v. Rehner*, 463 U.S. 713, 732 (1983) (canon of construction regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"); *Andrus v. Glover Construction Co.*, 446 U.S. 608, 618-619 (1980); *DeCoteau v. District County Court*, 420 U.S., at 447 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent"). . . . [22] It is an "elementary cannon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). See also *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair v. Ramsdell*, 107 U.S. 147, 152, rather than to emasculate an entire section").

476 U.S. at 506, 510.

By according the statutory language in the *Yankton* case its "ordinary meaning," a "most incongruous" result will be laid to rest. *Id.* at 507.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605) 487-7645
Counsel of Record

APPENDICES

APPENDIX TABLE OF CONTENTS

	Page
Letter of Instruction from the Commissioner of Indian Affairs to the Sisseton Commission of August 13, 1889 (APPENDIX A)	1a
Excerpt from H.R. Rep. No. 7613, 59th Cong., 2d Sess. (1907) (APPENDIX B)	4a
Proclamation of April 11, 1892 opening the Sisseton-Wahpeton Reservation, 27 Stat. 1017 (APPENDIX C)..	7a

APPENDIX A

LETTER OF COMMISSIONER OF INDIAN AFFAIRS, NATIONAL ARCHIVES LAND DIVISION LETTER BOOK 188.

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

August 13, 1889.

Gentlemen:

Upon receipt hereof, you will proceed to the Sisseton Agency, Dakota, for the purpose of negotiating with the Sisseton and Wahpeton Indians for the relinquishment of such portions of the Lake Traverse Reservation not allotted, as said Indians may consent to release.

Such negotiations are authorized by the 5th Section of the Act of February 7, 1887, which provides: "That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time consent to sell, on such terms and conditions as shall be considered just and equitable, between the United States and said tribe, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress".

The Lake Traverse Reservation was created by the 3rd Article of the treaty between the United States and the Sisseton and Wahpeton Bands of Dakota Sioux Indians, concluded February 19, 1867. (15 Stats. 505).

It contains 818,780 acres, of which some 127,887 acres have been allotted in severalty, and 1,417 acres reserved for church and other purposes, leaving a surplus of some 789,476 acres.

The allotments have virtually been completed although it is possible that some few individuals who were not on the reservation when the allotments were made in 1887 are entitled to allotments.

The treaty makes no provision regarding the cession or relinquishment of the reservation or any portion thereof.

It is understood that the Indians desire to sell a portion at least, of their surplus lands.

You will call a full council of the bands and submit the subject for their consideration. If a majority of such council determine to sell any portion of the reservation, you will then agree upon the quantity of land to be sold, and its location, which should be described by sections, or other legal subdivisions of townships.

It is not considered advisable that the cession at this time should embrace all these surplus lands. A sufficient quantity should be reserved for future contingencies.

The terms and conditions of the sale should then be agreed upon, which should be just and equitable to the Indians, as well as to the United States.

You will explain to the Indians that under the Act of February 8, 1887, the sums agreed to be paid as purchase money, will be paid in the Treasury of the United States for their sole use, the same with interest, thereon at 3 per cent per annum, to be at all times subject to appropriation by Congress for the education and civilization of said Indians.

The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying form of agreement, which should be signed by at least a majority of the male adults of the bands.

All such adults should be given an opportunity to sign.

When freely and properly signed, your certificates and the certificate of the Official Interpreter, should be attached to the instrument.

The proceeding of the Council should be reduced to writing and attested by your signatures and that of the Official Interpreter.

The Indians should be informed that the negotiations will not be valid or binding until ratified by Congress.

Very respectfully,

/s/ T. J. Morgan
Commissioner

APPENDIX B

59TH CONGRESS, *2d Session*

REPORT No. 7613

HOUSE OF REPRESENTATIVES

SALE AND DISPOSITION OF CERTAIN LANDS IN ROSEBUD INDIAN RESERVATION, S. DAK.

FEBRUARY 14, 1907.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. BURKE, of South Dakota, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany H. R. 24987.]

* * * *

Section 6 of the bill reserves sections 16 and 36 in each township for the use of the common schools, and grants the same to the State of South Dakota, and section 7 make an appropriation to pay for the same at $2.50 per acre. This is following the precedents which have heretofore been established in the opening of other reservations in South Dakota, and is based upon section 10 of the act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:

> SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States,

> and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor to indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands restored to and become a part of the public domain.

The following are the precedents:

By section 30 of the act opening and dividing the Great Sioux Reservation, sections 16 and 36 were granted to the State, and an appropriation of $1.25 per acre was made to pay for same. Act approved March 2, 1889. (25 Stat. L. 898.)

By section 30, act approved March 3, 1891, opening the Sisseton and Wahpeton Reservation, the school sections were ceded to the State and an appropriation made, and the same were paid for at $2.50 per acre. (26 Stat. L., 1039.)

By act of August 15, 1894, opening the Yankton Reservation, the school sections were ceded to the State and paid for at $3.75 per acre. (28 Stat. L., 313.)

Act providing for sale of Rosebud Reservation, in Gregory County, school sections were ceded and paid for

at $2.50 per acre, and act authorizing sale of a portion of the Lower Brule Reseravtion, first session of this (Fifty-ninth) Congress, school sections were ceded to the State and paid for at $1.25 per acre.

For the purpose of showing that the bill has the approval of the Secretary of the Interior and the Commissioner of Indian Affairs, their letters are attached hereto, together with a copy of the agreement. . . .

APPENDIX C

BY THE PRESIDENT OF THE
UNITED STATES OF AMERICA

A PROCLAMATION.

Whereas, by the third article of the treaty between the United States of America and the Sisseton and Wahpeton bands of Dakota or Sioux Indians, concluded February 19, 1867, proclaimed May 2, 1867 (15 U.S. Statutes, p. 505), the United States set apart and reserved for certain of said Indians certain lands, particularly described, being situated partly in North Dakota and partly in South Dakota, and known as the Lake Traverse Reservation; and

Whereas, by agreement made with said Indians residing on said reservation, dated December 12, 1889, they conveyed, as set forth in article one thereof, to the United States, all their title and interest in and to all the unallotted lands within the limits of the reservation set apart as aforesaid remaining after the allotments shall have been made, which are provided for in article four of the agreement, as follows:

> That there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made of such individual;

and

Whereas, it is provided in article two of said agreement,

> That the cession, sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of $342,778.37, together with the sum of

> $18,400, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement;

and

Whereas, it is provided in the act of Congress approved March 3, 1891 (26 U.S. Statutes, pp. 1036-1038, Sec. 30), accepting and ratifying the agreement with said Indians:

> That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, expecting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located: *Provided*, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same.

and

Whereas, Payment as required by said act, has been made by the United States; and

Whereas, Allotments as provided for in said agreement, as now appears by the records of the Department of the Interior will have been made, approved, and completed,

and all other terms and considerations required will have been complied with on the day and hour hereinafter fixed for opening said lands to settlement.

Now, therefore, I, Benjamin Harrison, President of the United States, do hereby declare and make known that all of the lands embraced in said reservation, saving and excepting the lands reserved for and allotted to said Indians, and the lands reserved for other purposes in pursuance of the provisions of said agreement and the said act of Congress ratifying the same and other, the laws relating thereto will, at and after the hour of twelve o'clock noon (central standard time) on the fifteenth day of April, A. D. eighteen hundred and ninety-two, and not before, be opened to settlement under the terms of and subject to all the terms and conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, and the laws of the United States applicable thereto.

The lands to be opened for settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Lake Traverse Reservation opened to settlement by proclamation of the President dated April 11, 1892," and which schedule is made a part hereof.

Warning, moreover, is hereby given that until said lands are opened to settlement as herein provided, all persons, save said Indians, are forbidden to enter upon and occupy the same or any part thereof.

And further notice is hereby given that it has been duly ordered that the lands mentioned and included in this Proclamation shall be, and the same are attached to the Fargo and Watertown land districts, in said States, as follows:

1. All that portion of the Lake Traverse Reservation, commencing at the northwest corner of said reservation;

thence south 12 degrees 2 minutes west, following the west boundary of the reservation to the new seventh standard parallel, or boundary line between the States of North and South Dakota; thence east, following the new seventh standard parallel to its intersection with the north boundary of said Indian reservation; thence northwesterly with said boundary to the place of beginning, is attached to the Fargo land district, the office of which is now located at Fargo, North Dakota.

2. All that portion of the Lake Traverse Reservation, commencing at a point where the new seventh standard parallel intersects the west boundary of said reservation; thence southerly along the west boundary of said reservation to its extreme southern limit; thence northerly along the east boundary of said reservation to Lake Traverse; thence north with said lake to the northeast corner of the Lake Traverse Indian Reservation; thence westerly with the north boundary of said reservation to its intersection with the new seventh standard parallel, or boundary line between the States of North and South Dakota; thence with the new seventh standard parallel to the place of beginning, is attached to the Watertown land district, the office of which is now located at Watertown, South Dakota.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this eleventh day of April, in the year of our Lord one thousand
[SEAL] eight hundred and ninety-two , and of the Independence of the United States the one hundred
pendence of the United States the one hundred
and sixteenth.

BENJ HARRISON

By the President:

JAMES G. BLAINE

Secretary of State.